IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-429

LUCKY STORES, INC., A CALIFORNIA CORPORATION,
Petitioner,

vs.

VILLAGE OF LOMBARD, A MUNICIPAL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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vs.

VILLAGE OF LOMBARD, A MUNICIPAL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioner, LUCKY STORES, INC., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above-captioned case.

OPINIONS BELOW.

The district court did not write an opinion, however, a transcript of the proceedings therein is set forth herein at Appendix A.

The court of appeals' judgment dated May 21, 1979, affirming the district court's order of dismissal, is unpublished and is

set forth herein at Appendix B. The court of appeals' order dated June 18, 1979, denying the petition for rehearing is set forth herein at Appendix C.

JURISDICTION.

The court of appeals' judgment affirming the district court's dismissal of petitioner's complaint was issued on May 21, 1979. A timely petition for rehearing was denied on June 18, 1979, and this petition for writ of certiorari is being filed within ninety (90) days from the entry of that date. 28 *U. S. C.*, § 2101(c). This Court's jurisdiction is properly [invoked] pursuant to Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

I. Whether the Doctrine of Abstention as enunciated in *Hicks* v. *Miranda*, should be applied to effectively oust a federal suitor from a federal forum when jurisdiction is based exclusively on diversity of citizenship?

II. Whether the District Court erred in denying the Petitioner an opportunity to allege and conduct a hearing with respect to bad faith, harassment or abstention under the exception carved out by *Younger* v. *Harris* and its progeny?

STATUTORY PROVISIONS INVOLVED.

§ 1332. DIVERSITY OF CITIZENSHIP: AMOUNT IN CONTROVERSY; COSTS

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 10603(a) of this title, as plaintiff and citizens of a State or of different States.

28 *U. S. C.* § 1332, as amended October 21, 1976, Pub. L. 94-583, § 3, 90 *Stat.* 2891.

STATEMENT OF THE CASE.

On March 31, 1978, Petitioner, Lucky Stores, Incorporated, (hereinafter referred to as "Lucky"), filed its Complaint for a Declaratory Judgment under 28 *U. S. C.* § 2201, and other relief against Respondent, Village of Lombard (hereinafter referred to as "Lombard"). Jurisdiction was based exclusively on diversity of citizenship with the amount in controversy being in excess of Ten Thousand ($10,000.00) Dollars exclusive of interest.

The nature of the case involves the demand by Lombard on Lucky to remove or alter Lucky's pylon sign located at the entrance of the store's parking lot.

There is no question that the sign ir volved presently exceeds the allowable square footage permitted under the present Lombard sign ordinance. Said sign was, however, lawfully erected prior to the present Lombard sign ordinance. As such, the sign is to be characterized as a pre-existing legal non-conforming use. Lucky has in the past conducted its business at the store in question under the name of "MEMCO". It recently changed the lettering on its pylon sign involved from "MEMCO" to "EAGLE". No other alteration was made. It is Lucky's contention that it had a right to change the lettering on its sign, pursuant to Section VIII of the Lombard sign ordinance. On the other hand, Lombard maintains that such change requires Lucky to remove its sign, as the change of lettering renders the sign an illegal nonconforming use.

Lucky filed suit seeking a Declaratory Judgment and other appropriate relief in federal court based exclusively on diversity of citizenship grounds. No motion for a restraining order or injunction was ever presented by Lucky.

On May 18, 1978, the Honorable Judge Crowley entered an Order of Dismissal of Petitioner's Complaint based on a lack of subject matter jurisdiction, due to insufficient jurisdictional amount.

Upon receipt by mail of said Order of Dismissal dated May 18, 1978, Lucky timely filed on May 30, 1978, its Motion to Vacate said Order and attached an Affidavit showing that the matter in controversy exceeded $24,000.00 exclusive of interest. No counter-affidavits were filed. Complete diversity between the parties existed at the time the Petitioner filed its Complaint.

On June 6, 1978, Lucky's Motion to Vacate the Court's Order of May 18, 1978, based on an alleged want in satisfying the jurisdictional amount was heard by the Honorable Judge Crowley. Said Motion to Vacate was denied [Appendix A, p. A2]. It appears from the record that the District Court *sua sponte* invoked the Doctrine of Abstention as articulated by *Railroad Commission of Texas* v. *Pullman Company,* 312 U. S. 496 (1941) [Appendix A, p. A2]. Furthermore, the Court cited *Younger* v. *Harris,* 401 U. S. 37 (1971) and *Huffman* v. *Pursue, Ltd.,* 420 U. S. 592 (1975) for the proposition that a federal court will not enjoin the enforcement of quasi-criminal ordinance [Appendix A, p. A2].

It appears from the record that the trial court was of the opinion that the jurisdictional defect regarding the requisite amount in controversy had been cured. [Appendix A, p. A3]. Notwithstanding the foregoing, the Court denied Lucky's Motion to Vacate the May 18, 1978 Order. Moreover, Lucky's Motion for Leave to File an Amended Complaint so as to conform to the Court's ruling was denied. [Appendix A, p. A4]. Subsequent to the court's ruling of June 6, 1978 Lucky learned that the Village of Lombard issued a new complaint regarding the sign in the Eighteenth Judicial Circuit Court of Illinois. This, although outside the trial court's knowledge, was introduced for the first time on appeal for the purpose of interposing the *Hicks* doctrine.

An appeal was perfected to the United States Court of Appeals for the Seventh Circuit. The Appellate Court affirmed the district court ruling. This petition seeks review of that judgment.

REASONS FOR GRANTING THE WRIT.

I.

THE DOCTRINE OF ABSTENTION AS ENUNCIATED IN HICKS v. MIRANDA SHOULD NOT BE APPLIED TO EFFECTIVELY OUST A FEDERAL SUITOR FROM A FEDERAL FORUM WHEN JURISDICTION IS BASED EXCLUSIVELY ON DIVERSITY OF CITIZENSHIP.

It is your petitioner's desire that this Court articulate its position on the application of the doctrine of abstention to a case based solely on diversity jurisdiction. Respectfully your petitioner urges this Court to set forth guidelines for the application of the abstention doctrine to pure diversity cases. A brief reading of the transcript of proceedings which is attached as Appendix A will highlight the need for new Supreme Court guidance in this sphere. Petitioner submits that having to literally go to the Supreme Court in order to assure one his day in court is preposterous disservice to a "normal diversity litigant" and to petitioner. This frustration with the abstention doctrine has been noted in law review articles as well as proposed legislation.[1]

Clearly, the amount in controversy, approximately $25,000.00, is not the compelling reason for pursuing this case. However, it is the contention of petitioner that the right to a federal forum cannot and should not be a matter of whim or pleasure of the trial court. This Court is being asked to articulate whether 28 *U. S. C.* § 1332(a)(1) is still alive and, if so, what are the

1. *See, e.g.*: Committee Report, "Imposing Liability Upon Governments For Civil Rights Violations And Imposing Limits Upon *Younger* v. *Harris*: Pending Legislation To Amend 42 *USC* § 1983," 33 *N. Y. C. B. A.* 141 (1978). Legislation has been pending in the United States Senate to reverse some of the recent wide-reaching decisions of this Court under the abstention doctrine. (Bill S. 35, as revised by Amend. No. 1426, 123 Cong. Rec. S. 16560 (Oct. 6, 1977).

bounds of the doctrine of abstention to the pure diversity context. The following discussion is intended to illustrate the need for Supreme Court guidance in this situation.

In the case of *Hicks* v. *Miranda,* 422 U. S. 332, 95 S. Ct. 2281 (1975), this Court laid down the watershed proposition as to the propriety of when a District Court may invoke the principles of *Younger* v. *Harris,* 401 U. S. 37, 91 S. Ct. 746 (1971), in dismissing a federal question cause of action. In this connection, the standard to be operative was articulated as follows:

> . . . we now hold that where state criminal proceedings are begun against the federal plaintiffs after the federal Complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger* v. *Harris* should apply in full force. 422 U. S. at 349, 95 S.Ct. at 2292.

This holding, however, is merely a starting point for solutions to the problem at bar, not a mechanical answer to them. Indeed, the precise contours of what constitutes "proceedings of substance on the merits" is not only opaque in its meaning, *Hicks,* 422 U. S. at 353 fn. 1 (Stewart, J. dissenting), but similarly, has continued to bedevil the lower federal courts in application. *Compare: Sovereign News Co.* v. *Falke,* 448 F. Supp. 306, 333-336 (N. D. Ohio, 1977) (finding of "proceedings of substance on the merits" so as not to abstain under *Younger*); *Graham* v. *Breier,* 418 F. Supp. 73, 78 (E. D. Wisc., 1976) (finding of "proceedings of substance on the merits" and *Younger* held not applicable); with *B. Coleman Corp.* v. *Walker,* 400 F. Supp. 1355, 1357 (N. D. Ill. 1975), *affirmed,* 547 F. 2d 1170 (7th Cir. 1976) (finding that there was not sufficient "proceedings of substance on the merits" thereby applying *Younger*).

More importantly, the subsequent pronouncements by this Court have largely left unresolved the question of abstaining in a purely diversity context when there is a later state complaint filed against the federal plaintiff. It is petitioner's contention that

Younger and *Hicks* are being expanded beyond their original context (federal question situations) to pure diversity issues.

In most, if not all, of the prolific progeny of *Hicks,* federal subject matter jurisdiction has been predicated not on diversity of citizenship, 28 *U. S. C.* § 1332(a)(1), but rather, upon the Federal Question provision, 28 *U. S. C.* § 1331. It is submitted that the rule as set forth in *Hicks* as it applies to those cases based on Federal Question jurisdiction, should be appreciably tempered, if not altogether abandoned, when administered in a diversity of citizenship setting.

The legal formula in *Hicks* for ascertaining the time in which to interpose the strictures of *Younger,* should not be construed as a talisman for allowing judicial abdication, nor must it be characterized as a concept of invariant content. So viewed, "a blind and uncritical application of *Younger* would be unwarranted and unwise when the policies underlying the equitable restraint doctrine are not disserved". *Ealy* v. *Littleton,* 569 F. 2d 219, 232 (5th Cir. 1978). There is not only a federal interest in having federal courts adjudicate all cases properly brought before it pursuant to a jurisdictional grant from Congress, *Miller* v. *Davis,* 507 F. 2d 308, 317 (6th Cir. 1974), but more fundamentally, federal courts are discharging their constitutional mandate as effectuated by Congress:

> A United States District Court clothed with power by Congress pursuant to the Constitution is not a mere adjunct to a state's judiciary machinery in entertaining diversity cases, it is responding to a Constitutional demand made effective by Congressional action and, as the recent abstention cases have made so clear, it has a Constitutional duty to hear and adjudicate. *Monarch Insurance Co.* v. *Spach,* 281 F. 2d 401, 407 (5th Cir. 1960).

To hew to the teachings of *Younger* and *Hicks* in the diversity case at bar is an impermissible incursion into the duty to adjudicate mandated by the Congressional directive of 28 *U. S. C.* § 1332(a)(1).

It need hardly be said that Congress, in enacting 28 *U. S. C.* § 1332(a)(1), adopted the policy of opening the doors of the federal courts to all diversity cases involving the appropriate jurisdictional amount to secure a tribunal presumed to be more dispassionate than a Court of the state in which one of the litigants resides. *Guaranty Trust Co. of New York* v. *York,* 326 U. S. 79, 111, 65 S. Ct. 1464, 1471 (1945); *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 74, 58 S. Ct. 817, 820 (1938). According to Justice Frankfurter, the Framers of the Constitution entertained "apprehensions lest distant suitors be subject to local bias in State Courts, or, at least, viewed with indulgence the possible fears and apprehensions of such suitors." *Guaranty Trust Co. of New York* v. *York, supra,* 304 U. S. at 74. Moreover, the federal courts have been vested with original jurisdiction over diversity actions ever since the passage of the First Judiciary Act, Act of September 24, 1789, § 11, 1 *Stat.* 73, but that no similar grant of jurisdiction was conferred on the lower federal courts in cases arising under the Constitution or laws of the United States until nearly a century later. Act of March 3, 1875, 18 *Stat.* 470. These considerations would suggest that an interposition of or a slavish adherence to the principles announced in *Younger* and *Hicks* in a diversity case such as the one at hand, would surely oust the federal courts from their historic role of assuring non-resident litigants of a forum free from susceptibility to potential local bias. Indeed, the application of *Hicks* in a diversity context creates "reverse removal power: a power to remove a case from the federal court to the state court." Fiss, "Dombrowski", 86 *Yale Law Journal,* 1103, 1136 (1977); but more significantly, the operative language therein emasculates the very purpose of federal diversity jurisdiction—to avoid bias against parties from outside the forum state.

In the wake of *Hicks,* if carried to its logical extreme, it is easy to envisage others similarly situated as Respondent by impulse to immediately institute state proceedings in order to defeat otherwise proper federal jurisdiction; for Respondent

would most certainly rather prosecute their claim against Petitioner in a more familiar state tribunal than have to defend the same in a federal forum.

One equally cannot be unmindful of the well ensconced proposition that the wisdom of or mere distaste for the wellspring of federal jurisdiction as executed under the diversity statute, is not a matter within the province of the judiciary. *Louisiana Power & Light Company* v. *City of Thibodaux,* 360 U. S. 25, 41, 79 S. Ct. 1070, 1080 (1959) (dissenting opinion); *Burford* v. *Sun Oil,* 319 U. S. 315, 337, 63 S. Ct. 1098, 1108 (1943) (dissenting opinion). In this regard, this Court has stated that:

> In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where Congressional intent is discernible . . . we must give effect to that intent. *Sinclair Refining Company* v. *Atkinson,* 370 U. S. 195, 215, 82 S.Ct. 1328, 1339 (1962), overruled on different grounds, *Boys Market, Inc.* v. *Retail Clerks Union Local 770,* 398 U.S. 235 (1970).

The choice of Congress in enacting the diversity statute is simple, its intent plain, and if a litigant may resort to invoking the *Hicks* doctrinal language of preempting a federal court of its jurisdiction before there has been "proceedings of substance on the merits" in a diversity case, then the whim of one's adversary will be vested with power to choose the forum at the expense of a strong Congressional mandate to the contrary; a result of which fundamentally alters the federal jurisdictional scheme.

Since the diversity statute has as its avowed purpose, the avoidance of prejudice against out of state residents, it is reasonable to argue that the standards for abstention by a federal court to refuse to exercise its diversity jurisdiction should be decidedly circumscribed. *McNeese* v. *Board of Education, Etc.,*

373 U. S. 668, 673, fn. 5, 83 S. Ct. 1433, 1436, fn. 5 (1963); *Meredith* v. *City of Winter Haven,* 320 U. S. 228, 234, 64 S. Ct. 7, 11 (1943); *Gentron Corp.* v. *H. C. Johnson Agencies, Inc.,* 79 F. R. D. 415, 418 (E. D. Wisc. 1978); Hart & Weschler, *The Federal Courts and The Federal System,* 989 (2d ed. 1973). These same considerations dictate that application of *Younger* and *Hicks* and its correlative principles of equitable restraint in a purely diversity context should likewise require a more rigorous touchstone than that promulgated in *Hicks* before effectively ousting a federal plaintiff from a federal forum. Petitioner submits that this Court should articulate guidelines in abstention cases requiring, as minimum, a hearing by the District Court judge of the factual reasons which would compel it to invoke the abstention doctrine. A reading of the transcript of proceedings (Appendix A) highlights the need for the dissemination of this guideline, even if the Court were to ultimately approve of abstention in a diversity settting. By allowing the full force of *Younger* to apply in any diversity case where, before there are "proceedings of substance on the merits", or a hearing on the abstention issue, a municipal citation akin to that subsequently instituted by Respondent against Petitioner were filed, would degenerate federal diversity jurisdiction into a paper tiger. It should be noted that in the case at bar no such hearing was held on the abstention issue, nor for the matter, on the "bad faith or harassment" question. This hearing is anticipated but not required by *Younger.*

The principles of *Younger* v. *Harris,* as applied in *Hicks,* reflect a central concern for the classic tenets of equity, comity and federalism. However, these concepts similarly require a "sensitivity to *both* State and National Governments", *Younger* v. *Harris,* 401 U. S. at 44, 91 S. Ct. at 750 (emphasis added), not "blind deference to 'State's Rights' ", *Ibid.* Mr. Justice Stewart correctly observed in this dissenting opinion in *Hicks* that:

> *Younger* v. *Harris* and its companion cases reflect the principles that the federal judiciary must refrain from interfering with the legitimate functioning of state courts. But surely the converse is a principle no less valid. *Hicks* v. *Miranda, supra,* 422 U. S. at 356, 95 S. Ct. at 2295.

Therefore, the mere incantation of federalism, without more, by a federal court in a diversity case is too slim a reed to rest the Petitioner's ejectment from a federal forum.

This Court should articulate clearly if *Hicks* should apply in a diversity context, as the case at bar is clearly distinguishable from the fact scenario of *Hicks.* One ground of decision in *Hicks* was that the interests of a theatre owner were so intertwined with those of his employees, that pending state prosecutions against the employees barred a federal action filed by the owner. *Hicks, supra,* 422 U. S. at 348-349, 95 S. Ct. at 2291, 2292. Here, by contrast, at the time the federal action was filed by Petitioner, there were no related pending state court proceedings of any sort. Moreover, whereas the action instituted in *Hicks* by the district attorney was purely criminal in nature,[2] the complaint filed by the Respondents herein was merely a citation to effectuate a local Village ordinance. Indeed, one commentator has maintained that a proceeding brought to enforce a local ordinance may not involve a state interest of sufficient magnitude, under the *Younger* balancing process, to require dismissal of the federal action in the *Hicks* procedural posture. "Federal Equitable Restraint: A *Younger* Analysis in New Settings", 35 *Maryland Law Review,* 483, 507 (1976).

The case of *Huffman* v. *Pursue, Ltd.,* 420 U. S. 592 (1975) does not compel a different result. There, the *Younger* interdiction was held applicable to state proceedings "akin to a criminal prosecution". 420 U. S. at 604. On the other hand, there is no *state*-wide policy to vindicate nor any statute to enforce in the case at hand; nor, for that matter, should the Respondent be characterized as an arm of the sovereign for *Younger* pur-

2. "Today, the State must file a *criminal* charge to secure dismissal of the federal litigation." *Hicks* v. *Miranda, supra,* 442 U. S. at 357 (dessenting opinion) (emphasis added).

poses. Furthermore, to highlight the frustrations of your petitioner in this cause, the trial court never gave your petitioner an opportunity to discuss these considerations, but rather, summarily foreclosed such consideration. (See Appendix A at A3). Had such a hearing been exacted by Supreme Court mandate, the onus of this burdensome procedure upon petitioner would never have been required.

To further buttress the Petitioner's contention of the unseemly interposition of *Younger* and *Hicks*, is a recent pronouncement by this Court on the propriety of declining to exercise jurisdiction when a state court proceeding has been filed subsequent to the federal question suit. In *Town of Lockport* v. *Citizens For Community Action*, 430 U. S. 259, 97 S. Ct. 1047 (1977), the Court, speaking through Mr. Justice Stewart, rejected the applicability of *Younger* in a *Hicks* context:

> The District Court also enjoined pending state proceedings brought by the appellants to challenge the certification and enforcement of the 1974 Charter. The appellants now argue that the District Court should have deferred to the jurisdiction of the state court. Even assuming that *Younger* v. *Harris*, 401 U. S. 37, principles are fully applicable in the civil rights context, however, the original action challenging the dual-majority provision of the New York law had been brought in the federal court *well before* the appellants filed their state-court action, and principles of comity and federalism, do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court. 430 U. S. at 26, fn. 8, 97 S. Ct. at 1051, fn. 8. (emphasis added).

The import of that language compels the result that Petitioner was similarly denied his rightful access to a federal forum. While *Town of Lockport, supra,* held that the doctrine of equitable restraint would not lead to a dismissal of the federal complaint in a sensitive federal question context, then that same result must obtain here, *a fortiori,* where the Petitioner's claim is predicated merely on diversity of citizenship and purely state-created rights. Furthermore, the original action of the Petitioner

had been instituted over two months before Respondents decided to file their Village complaint. Clearly, this should be deemed in the words of this Court to be "well before" the Respondents later filed their claim. *Town of Lockport, supra,* 430 U. S. at 264, fn. 8.

In the final analysis, on the issue of whether *Younger* and *Hicks* should be inexorably applied to a purely diversity context, as in all issues under the rubric of "Our Federalism", lower federal court decisions are of limited value in directing future adjudications. This leads inescapably to the conclusion that because the doctrine is a creature of this Court and because this Court has not in the past been reluctant to redefine its contours, then this Court must address itself to this particular novel issue for final resolution by granting the Petitioner's request for Certiorari. The Petitioner should not be subjected to the Sword of Damocles hanging over its head when it properly invokes federal diversity jurisdiction and merely seeks a neutral forum for the adjudication of its rights with respect to its sign.

II.

THE DISTRICT COURT ERRED IN DENYING PETITIONER AN OPPORTUNITY TO ALLEGE AND CONDUCT A HEARING WITH RESPECT TO BAD FAITH, HARASSMENT OR ABSTENTION UNDER THE EXCEPTION CARVED OUT BY YOUNGER v. HARRIS AND ITS PROGENY.

Even assuming *arguendo* that *Younger* and *Hicks* apply in a diversity context, the District Court must, at a minimum, at least afford the proponent an *opportunity* to fall within the exception fashioned by the principle case. In this regard, the *Younger* interdiction was held not to apply where the federal plaintiff could affirmatively adduce evidence of "bad faith, harassment, or any other unusual circumstances that would call for equitable relief." *Younger* v. *Harris, supra,* 401 U. S. at 54. It is submitted that the District Court failed altogether to even allow Petitioner leave to amend its complaint so as to ac-

cord it an occasion to conform within the safe harbor created by *Younger.*

No doubt there is truth in the proposition that 15(a) of the Federal Rules of Civil Procedure encourages a court to look generously upon requests to amend, as it expressly states that "leave shall be freely given when justice so requires". So also have the decisions of this Court hospitably reinforced what the language of the rule plainly intends to impart. *e.g., Gillespie* v. *U. S. Steel Corp.*, 379 U. S. 148, 85 S. Ct. 308 (1964); *Foman* v. *Davis,* 371 U. S. 178, 83 S. Ct. 227 (1962). But more significantly, that same subdivision of Rule 15 additionally specifies that "[a] party may amend his pleading once as a matter of course any time before a responsive pleading is served. . .". In the case at bar, the Respondent had merely filed a motion to dismiss grounded on the alleged failure by Petitioner to satisfy the requisite jurisdictional amount. There was no answer filed by Respondent to the original pleadings. The law in the Seventh Circuit clearly establishes that a motion to dismiss is not tantamount to, nor the functional equivalent of, a "responsive pleading" pursuant to Rule 15, and, thereby confers upon the plaintiff the right to amend his pleading as a matter of course and without leave of court. *LaBatt* v. *Twomey,* 513 F. 2d 641, 650-651 (7th Cir. 1974). Furthermore, the Respondent cannot claim surprise by any proposed amendment; indeed, if there is surprise it was when the trial court on its own motion invoked the doctrine of abstention. (See Appendix A at pp. A3-4). As a result, the Petitioner had a right to amend his complaint which he could not be deprived in order to aver the essential requirement of bad faith or harassment under the *Younger* doctrine.

The right of the Petitioner to amend his complaint takes on an added dimension in view that the inquiry of whether bad faith or harassment exists is characterized as a question of fact, not law. Indeed, this Court, on the same day it decided *Younger,* held in a companion case, that the "existence of such injury is a matter to be determined carefully under the facts of each case".

Dyson v. *Stein,* 401 U. S. 200, 203, 91 S. Ct. 769, 771 (1971); *Accord*: *Wilson* v. *Thompson,* 593 F. 2d 1375, 1388 (5th Cir. 1979); *Beecher* v. *Baxley,* 549 F. 2d 974, 977 (5th Cir. 1977); *Shaw* v. *Garrison,* 467 F. 2d 113, 120, fn. 8 (5th Cir. 1972), reversed on different grounds, 436 U. S. 584 (1978). The inescapable point is that because the issue of bad faith or harassment is largely a question of fact, depending on the circumstances of the particular case, the District Court erred, and the Petitioner was prejudiced, by not permitting the Petitioner to, at a minimum, demonstrate whether he is a beneficiary of the *Younger* exception. This situation could be avoided in the future by the issuance by this Court of a mandate affording, at minimum, a hearing on the abstention or "bad faith" etc. issue.

By parity of reasoning, it was reversible error for the District Court to not only deny Petitioner to rightfully amend his complaint, but more importantly, to wholly fail to conduct an evidentiary hearing on the contention of bad faith or harassment. (See Appendix A.) This issue was brought into sharp focus in *Stewart* v. *Davis,* 460 F. 2d 278 (5th Cir. 1972), wherein the Court concluded that the trial judge should have, at the least, listened to actual tape recordings before deciding that the plaintiff was being prosecuted in good faith, thereby negating the plaintiff's allegations of bad faith and harassment. 460 F. 2d at 279. To this end, the Court, conceding that a plaintiff bears a heavy burden on establishing either prosecutorial bad faith or harassment, maintained that "we think he is nonetheless entitled to a hearing conducted in conformity with constitutional provisions" in order to ascertain the merit of his bad faith or harassment disputation. *Ibid.*

It cannot be overemphasized and this Court must be mindful of the fact that Petitioner does not seek an answer to the more troublesome question, namely, the precise contours of bad faith or harassment in the *Younger* sense, but rather, merely the bare opportunity to present such allegations in the District Court to determine their propriety. For it is one thing to say

that the exception to the doctrine of equitable restraint necessitates a showing of bad faith or harassment on part of a plaintiff, but it is quite another, to altogether foreclose that plaintiff from even endeavoring to prove that he falls squarely within that judicially formulated qualification. This especially is true in view of the most liberal rules for amendment observed by this Court, *Foman* v. *Davis, supra,* 371 U. S. at 182, 83 S. Ct. at 230, and the Seventh Circuit. *Fuhrer* v. *Fuhrer,* 292 F. 2d 140, 143 (7th Cir. 1961). Even under *Hicks* the District Court conducted an evidentiary hearing on the asserted allegation by the federal plaintiff of bad faith and harassment on part of the defendant, 422 U. S. at 350, 95 S. Ct. at 2292, and there is no valid reason why a similar fact-finding determination should be no less applicable in the case at hand. To be sure, the protective mantle furnished by *Younger* and its progeny furthers the legitimate concerns of federalism and comity among sovereigns, yet, this same doctrine can work a grave mischief upon a federal plaintiff, such as Petitioner, when exalted into a prophylactic rule which cavalierly dismisses out of hand any attempt by the proponent to substantiate his bad faith or harassment claim.

In short, the question of bad faith and harassment under *Younger* is a factual inquiry, the determination of which turns on the circumstances of the particular case. Here, it is not so much that the District Court may have abused his discretion in disallowing an amendment to the pleadings, but that the fundamental right of the Petitioner of a mere opportunity to be heard on the issue of bad faith and harassment was improperly withheld. It is the Petitioner's fervent hope that this Court will see fit to review this matter.

CONCLUSION.

For the reasons discussed above, Petitioner respectfully requests a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

LUCKY STORES, INC., a California Corporation,
Plaintiff,
vs.
VILLAGE OF LOMBARD, a municipal corporation of Illinois,
Defendant.

No. 78 C 1198

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable John Powers Crowley, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on June 6, 1978, at 9:30 a.m.

Present:

MR. HOWARD E. GILBERT,
(134 North LaSalle Street, Chicago, Ill.),
on behalf of Plaintiff;

MS. SARAH A. HANSEN,
(Klein, Thorpe and Jenkins, Ltd.,
180 N. LaSalle, Chicago, Ill. 60601),
on behalf of Defendant.

The Clerk: 78 C 1198, Lucky Stores v. Village of Lombard, motion to vacate order of dismissal of May 18th.

Mr. Gilbert: Good morning, your Honor. My name is Howard Gilbert. I represent the plaintiff, Lucky Stores, Inc.,

on this motion, your Honor. We filed our motion with the Court. We had received an order of dismissal on the case, which came as a surprise to us, since we didn't know a motion had been pending.

The Court: All right.

Mr. Gilbert: Nor had we received it.

The order of dismissal appears to deal with the concept—

The Court: With the jurisdictional amount. You have submitted an affidavit.

Mr. Gilbert. That is correct, your Honor.

The Court: All right. Well, counsel, I will tell you this, in reading the complaint, there are two additional grounds upon which I would feel compelled on my own motion to dismiss this action, and the first of that is the abstention doctrine. We are talking about a municipal ordinance or a village ordinance that you are bringing into the Federal Court purely on diversity, alleged diversity of citizenship, and I think under the principles of the Railroad Commission of Texas v. Pullman, established at least since 1941, that rulings by Federal Courts construing state or local law are not only unnecessary but they really violate long-held principles of federalism. There is no question here of the constitutionality of the statute.

Secondly, one of your prayers for relief seeks to enjoin the enforcement of this ordinance and, again, under the well-established principles as enunciated by the Supreme Court in Younger v. Harris and Huffman v. Pursue, I can't grant an injunctive relief against the enforcement of a quasi-criminal ordinance, and for those reasons—I will add those to my reasons for dismissal of the complaint, and deny your motion.

Mr. Gilbert: Well, if it please the Court, in all due respect, I don't feel that if we did not receive a motion and an opportunity to—

The Court: Counsel, I am doing this on my own motion, O.K.?

Mr. Gilbert: Well, if it please the Court, I would at least like an opportunity to respond to those things. If the Court is dismissing my complaint, I would like at least an opportunity to respond to those things, if for anything, for the record, if for anything, to amend my complaint, if that be the case.

The Court: How are you going to amend your complaint to cure the abstention doctrine?

Mr. Gilbert: Your Honor, I have not studied the abstention doctrine up until this point, I haven't had an opportunity to do so.

The only thing that I received was a dismissal order saying that we did not meet the jurisdictional basis.

I have submitted an affidavit and a memorandum of law on that point.

The Court: Right.

Mr. Gilbert: I believe that on that point the Court—I believe we are entitled at least to that aspect.

The Court: I have said to you, counsel, that you have cured the jurisdictional defect, but on the two additional grounds—I don't think Federal Courts should be concerning themselves with whether the Village of Lombard acted within its authority in establishing height regulations and size regulations on signs for grocery stores. That is a village ordinance which the Courts of Illinois are more than competent, indeed, more competent than the Federal Courts, to construe.

Your complaint is dismissed, counsel.

Mr. Gilbert: Well, your Honor, if it please the Court, I would at least like the Court's additional reason in its order stated.

The Court: I have just stated them, counsel. I don't think I can make them any clearer.

Mr. Gilbert: Your Honor, in all fairness, I understand the Court has done its own research.

The Court: If you wish to appeal, appeal.

Mr. Gilbert: At this point in time I haven't even had an opportunity to respond to these things. I don't think that is fair, I honestly don't. I understand this is a Federal Court and your Honor can, you know, bring things up.

I think the plaintiff has at least an opportunity to file something in response to what the Court is raising—

The Court: Counsel—

Mr. Gilbert: —at least that much of the due process give me so that—

The Court: Counsel—

Mr. Gilbert: —I can at least file for my record—

The Court: Counsel, at least give me—I have ruled.

Mr. Gilbert: Well—

The Court: Well—

Mr. Gilbert: Is this the final order of today? Do I have my appeal period run from today?

The Court: Your appeal period runs from today.

Mr. Gilbert: And this is based on abstention?

The Court: What I have just said, abstention and the lack of jurisdiction in a Federal Court to enjoin the enforcement of a quasi-criminal ordinance.

Mr. Gilbert: I would like to ask leave to file an amended complaint.

The Court: Denied. Call the next case.

The Clerk: 74 C 2341—

The Court: I suggest you file a complaint in the State Court.

Mr. Gilbert: I understand, your Honor.

The Court: All right.

Mr. Gilbert: The State courts—that is exactly why we are in the Federal Court, to get fair treatment, but we don't get that here either.

The Court: Counsel, that statement is contemptuous.

Mr. Gilbert: Your Honor, I am sorry.

The Court: All right.

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

LUCKY STORES, INC., *Plaintiff,*
vs.
VILLAGE OF LOMBARD, *Defendant.*
No. 78 C 1198.

CERTIFICATE.

I hereby certify that the foregoing transcript, consisting of Pages 1 to 6, inclusive, is a full, true and accurate transcript of my official shorthand notes taken at the hearing of the above-entitled cause before the Honorable JOHN POWERS CROWLEY, one of the Judges of said Court, on June 6, 1978.

/s/ RAYMOND J. COMEAU,
Official Court Reporter, United States District Court, Northern District of Illinois, Eastern Division.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued April 4, 1979

May 21, 1979

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. WILLIAM J. JAMESON, *Senior District Judge**

LUCKY STORES, INC.,
Plaintiff-Appellant,
No. 78-1912 *vs.*
VILLAGE OF LOMBARD,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78-C-1198

John P. Crowley,
Judge.

ORDER.

This appeal arises from the district court's order which refused to vacate the dismissal of appellant's diversity complaint on the basis of equitable restraint required under *Younger* v. *Harris,* 401 U. S. 37, and the doctrine of abstention. This Court has jurisdiction under 28 U. S. C. § 1291. We affirm.

* Senior District Judge William J. Jameson of the District of Montana is sitting by designation.

We assume, of course, the truth of the well-pleaded facts alleged in plaintiff's complaint, which are, in material part as follows: On March 16, 1978, the Village of Lombard, Illinois, acting through its zoning administrator, presented a written demand on plaintiff Lucky Stores (Lucky) to remove or to alter its pylon sign located at the entrance of the store's parking lot. Plaintiff admitted that the sign exceeds the allowable square footage permitted under the present ordinance, but alleged that the sign was lawfully erected prior to the enactment of the present ordinance, and therefore is a preexisting legal nonconforming use.

Lucky had done business at that Lombard location for several years under the business name of Memco, but recently changed the business name of the store to Eagle. At the same time, Lucky substituted "Eagle" for "Memco" on the free-standing sign located on the store's lot. No other words appear on the sign and no other change in the sign was made. Lucky contends that the alteration was lawful[1] and did not destroy the sign's status as a preexisting nonconforming use. On the other hand, the Village's position is that the "change in lettering" eliminates the sign's status as a legal nonconforming use and therefore the sign must either be removed or altered to comply with the size requirements of the present ordinance.

On March 31, 1978, Lucky filed a complaint in the district court seeking a declaration that the existing sign may remain as it is and seeking a temporary restraining order or injunction preventing the Village from instituting criminal or other sanctions against Lucky pending the disposition of the litigation in

1. Section VIII of the Sign Ordinance of the Village of Lombard states as follows:

> "It shall be unlawful for any person to erect, construct, alter, or relocate any sign within the Village of Lombard without first obtaining a permit from the enforcement official and paying the fee required. Routine maintenance of changing of parts designed for changes shall not be considered an alteration, provided such change does not alter the surface area, height, or otherwise make the sign non-conforming."

the district court. On May 18, 1978, the district court granted defendant's motion to dismiss the complaint on the ground that plaintiff failed to satisfy the jurisdictional amount since there is no probability that the value of the matter in controversy will exceed $10,000.

On June 6, 1978, the district court denied a motion to vacate the dismissal order and refused to permit plaintiff to amend its complaint. In open court, the district judge acknowledged that plaintiff had cured the defect regarding the amount in controversy[2] but held that the abstention doctrine of *Railroad Commission of Texas* v. *Pullman,* 312 U. S. 496, and the analogous equitable prohibition on federal courts from enjoining the enforcement of a state's quasi-criminal ordinances[3] lent additional support for dismissing the complaint. Thus the trial court refused to vacate its earlier dismissal order. No reference was made at this hearing or in the resultant order to the state suit which had been commenced by the Village for violation of its sign ordinance one day earlier, on June 5, 1978. At oral argument in this Court, counsel for Lucky noted that neither he nor the district court were aware of the filing of the Village's complaint at the time the dismissal order was entered.

Abstention

In holding that the doctrine of abstention bars the federal action, the district court referred to the principles established in *Railroad Commission of Texas* v. *Pullman,* 312 U. S. 496, which disfavor federal courts from unnecessarily construing state or local law. In *Pullman* plaintiffs brought an action to enjoin under state law as violative of the Fourteenth Amendment an order of the Texas Railroad Commission which required

2. Exhibit B to the Motion to Vacate was an affidavit from an electrical contractor attesting to the fact that the minimum cost for removing the existing sign and installing a new sign would be at least $24,029. At the hearing, the trial court stated: "I have said to you counsel, that you have cured the jurisdictional defect * * *" (Transcript of June 6, 1978 proceedings at 4).

3. See *Younger* v. *Harris,* 401 U. S. 37.

Pullman conductors to supervise all sleeping cars on passenger trains. The Supreme Court held that in an action for an injunction it is proper for the district court to stay the federal action pending the determination of unresolved issues of state law in the state court when decision of the state law issues might obviate the need to decide a constitutional question. 312 U. S. at 501. Under *Pullman* since the federal action is stayed, federal jurisdiction is only deferred but is not eliminated.

Through a development of the general principles of federalism outlined in *Pullman,* abstention has also been held to be proper in diversity cases such as this. See *Fornaris* v. *Ridge Tool Co.,* 400 U. S. 41; *United Gas Pipe Line Co.* v. *Ideal Cement,* 369 U. S. 134. The holding in *Clay* v. *Sun Insurance Office,* 363 U. S. 207, is of particular interest. In *Clay* petitioner brought a diversity suit for damages incurred in Florida allegedly covered by an insurance contract issued to petitioner while he was a resident of Illinois. Respondent interposed defenses based on Florida law. The Supreme Court held first that state law should be applied before reaching the federal constitutional question, and second that since the state law in that case was not "settled"[4] the district court should stay the federal suit pending the state court's resolution of the issues arising under state law.

Thus the *Pullman* abstention doctrine turns on the existence of an uncertain issue of state law, the decision of which may obviate the need to consider a federal constitutional question

4. But see the dissenting opinion of Justice Black, Chief Justice Warren, and Justice Douglas:

> "I agree that it is frequently better not to decide constitutional questions when decision of nonconstitutional questions also presented will dispose of a case. But I do not agree that this is such an occasion. The state law questions do not call for first interpretation of a broad, many-pronged state regulatory scheme. They do not involve peculiarly local questions * * * nor are the state questions here difficult ones depending on ambiguous or vague state law, but instead they border on the frivolous." (Footnotes omitted.) 363 U. S. at 213-214.

which has been raised in a federal question or diversity action.[5] There has been some variation in the degree of uncertainty in the state law which must be evidenced in order to justify abstention. In a diversity action the Supreme Court has stated that abstention is proper when it is "conceivable" that the state court decision might obviate the need to consider the constitutional issue. *Fornaris,* 400 U. S. at 43.

Lucky contends that because there is no allegation in its complaint that the Village ordinance violates the federal constitution, there is no constitutional issue which may be avoided by state court construction of unsettled state law and therefore abstention is inappropriate. Lucky additionally argues that the state law is settled, and therefore construction of the Lombard ordinance by a federal court will not have an impermissibly disruptive effect.

However, certain developments in the law since *Pullman* have made it clear that federal courts will also refuse to determine unsettled issues of state law even when a federal constitutional question has not been presented. *Colorado River Water Conservation District* v. *United States,* 424 U. S. 800; *Louisiana Power & Light* v. *Thibodaux,* 360 U. S. 25; *County of Allegheny* v. *Frank Masuda Co.,* 360 U. S. 185; *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478; *Meredith* v. *City of Winter Haven,* 320 U. S. 228. The unsettled issue of state law, however, must bear "on policy problems of substantial import whose importance transcends the result of the case then at bar." *Colorado River Water Conservation District,* 424 U. S. at 814. What type of issue "transcends the result of the case" is not clear from the case law.[6] Other courts have held that abstention was

5. See 1A—Part 2 Moore's Federal Practice ¶ 203[1] at 2106-2107 (2d ed. 1978); *Pullman, supra,* 363 U. S. at 212.

6. See *Kaiser Steel Corp.* v. *W. S. Ranch Co.,* 391 U. S. 593 (the meaning of "public use" in New Mexico's eminent domain statute was held to be an unsettled state issue transcending the case before the court); *State of Idaho* ex rel. *Moon* v. *State Board of*

(Footnote continued on next page.)

proper solely in deference to a state's interest in the subject matter of the case without an highly unsettled issue of state law so long as the court is "in any doubt as to the proper meaning of the state statute." *Brown* v. *First National City Bank,* 503 F. 2d 114, 118 (2d Cir. 1974); *Gray Line Motor Tours, Inc.* v. *City of New Orleans,* 498 F. 2d 293, 298 (5th Cir. 1974); *Fralin & Waldron, Inc.* v. *City of Martinsville,* 493 F. 2d 481, 482-483 (4th Cir. 1974). We hold that abstention is warranted in this case because it involves matters peculiarly within the state's political interest which have been delegated to the Village. See, *e.g., City of Chicago* v. *Fieldcrest Dairies, Inc.,* 316 U. S. 168, 171-172. This result which avoids interference with administration of purely state affairs is likely to lessen friction in the federal-state relationship. Necessarily, then, we also conclude that the district court did not abuse its discretion in concluding that the application of the Lombard ordinance to Lucky involves the determination of a state law issue which is not "settled." That Illinois law on nonconforming use applies to Lucky and resolves the issues raised by it without further construction is not at all clear. See *e.g., Fralin & Waldron, Inc.* v. *City of Martinsville,* 493 F. 2d at 482.

The Younger Doctrine

As an alternate ground for dismissing the complaint, the district court ruled that the well-established principles enunciated in *Younger* v. *Harris,* 401 U. S. 37, prohibit the district court from awarding injunctive relief against a quasi-criminal ordinance. Under the *Younger* doctrine, a federal court is to dismiss actions for injunctive or declaratory relief[7] which challenge

(Footnote continued from preceding page.)

Examiners, 567 F. 2d 588 (9th Cir. 1978) (the interpretation of state constitutional provisions was held to be an unsettled issue warranting abstention). 1A—Part 2 Moore's Federal Practice ¶ 203[2], at 2122-2123 (2d ed. 1978).

7. For the purposes of the *Younger* doctrine, declaratory judgment actions are governed by the same principles as an injunction. *Dyson* v. *Stein,* 401 U. S. 200; *Samuels* v. *Mackell,* 401 U. S. 60.

state law under which the federal plaintiff is being prosecuted in state court unless the federal plaintiff can demonstrate irreparable harm, or that the state criminal or quasi-criminal proceeding[8] has been brought in bad faith.

Since, as the Village confirmed at oral argument, the district court did not know of the state court suit, the issue raised is whether *Younger* applies to a dismissal order entered when no state action is pending or when no state action was known by the district judge or the federal plaintiff to be pending. In *Steffel* v. *Thompson,* 415 U. S. 452, a case not discussed by either party to this appeal, the Supreme Court held that where no state criminal prosecution is pending but there is a threat of such prosecution and the federal plaintiff seeks a declaration as to the constitutionality of the state criminal statute, the constraints of *Younger* do not apply and the federal plaintiff need not demonstrate irreparable harm to secure a declaratory judgment. See also *Gibson* v. *Berryhill,* 411 U. S. 564. We conclude that the policy reasons underlying the extension of *Younger* to apply to the facts of *Steffel* warrant the extension of *Steffel* to apply to the facts of the present case. When no state proceeding is pending but there is a threat of institution of state quasi-criminal action, and the federal plaintiff seeks a declaration as to the "constitutionality" of the state criminal statute, the federal plaintiff need not demonstrate irreparable harm in order to defeat a motion to dismiss his federal complaint. Nonetheless the same policy reasons in *Younger* which favor deference to state enforcement of its own ordinances absent unconstitutional defects, supports our conclusion that there was no abuse of discretion in the district court's dismissing the federal complaint here.

8. The Court has extended *Younger* v. *Harris* to cases in which a state brings a civil proceeding, such as a public nuisance action, which is quasi-criminal. *Huffman* v. *Pursue,* 420 U. S. 592.

Amendment of the Complaint

Because amendment of the complaint could not cure the defect based on the abstention doctrine,[9] the district court denied leave to amend and entered a final order of dismissal of the case. On the basis of the foregoing analysis of the law of abstention applicable to actions for declaratory relief alone, we agree that amendment would be futile. *Fuhrer* v. *Fuhrer,* 292 F. 2d 140, 143 (7th Cir. 1961). Assuming *arguendo* that the state courts will not hear the case, because abstention is merely a postponement of federal jurisdiction but not its abdication, Lucky may then return to the federal court without prejudice for disposition on the merits.

For these reasons the judgment of the district court is affirmed.

9. Lucky wished to amend its complaint by deleting any prayer for injunctive relief against the Village preventing it from instituting criminal or other sanctions.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 18, 1979

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. WILLIAM J. JAMESON, *Senior District Judge**

LUCKY STORES, INC.,
Plaintiff-Appellant,

No. 78-1912 *vs.*

VILLAGE OF LOMBARD,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78-C-1198

John P. Crowley, Judge.

ORDER.

On consideration of the petition for rehearing filed in the above-entitled cause by appellant Lucky Stores, Inc., all of the judges on the original panel having voted to deny the same.

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Senior District Judge William J. Jameson of the District of Montana is sitting by designation.